Supreme Court, U.S.
FILED

No. 091229

APR 12 2010
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In The Supreme Court of the United States

October Term, 2010

MICHAEL LONECKE, RAYMOND DUFFY, ANNE NELSON, ROBERT S. FASH, and CRAIG A. HARRIS, Individually and on behalf of all those similarly situated, and WILLIAM WOODWARD, Individually and on behalf of all those similarly situated,

Petitioners,

v.

CITIGROUP PENSION PLAN, PLANS ADMINISTRATION COMMITTEE OF CITIGROUP, INC., CITIGROUP, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ERISA's prohibition against backloading is violated by not applying the fractional rule in all years and by testing compliance with the fractional rule only at separation of service, rather than on a year-by-year basis?

LIST OF PARTIES

The parties to this action are all listed in the caption: The Petitioners, Michael Lonecke, Raymond Duffy, Anne Nelson, Robert S. Fash, and Craig A. Harris, Individually and on behalf of all those similarly situated, were Plaintiffs-Appellees-Cross-Appellants in the courts below, William Woodward, Individually and on behalf of all others similarly situated, was a Plaintiff-Appellee in the courts below; Respondents, Citigroup Pension Plan, Plans Administration Committee of Citigroup, Inc., and Citigroup, Inc., were Defendants-Appellants-Cross-Appellees in the courts below.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Lonecke v. Citigroup Pension Plan*, 584 F.3d 457 (2d Cir. 2009) (Reprinted at Appendix 141a-168a). The Court of Appeals reversed the ruling of the district court granting partial summary judgment to Petitioners on various grounds, including: first, that the Plan violated ERISA's minimum benefit accrual rules through its use of the "fractional rule;" and second, that Respondents violated ERISA's § 204(h) notice requirement. The decision of the district court was issued on December 11, 2006 and can be found at *In re Citigroup Pension Plan ERISA Litigation*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006) (Appendix 1a-66a). Subsequent district court decisions can be found at 241 F.R.D. 172 (S.D.N.Y. 2006) (Appendix 67a-104a); No. 05-Civ-5296, 2007 U.S. Dist. 27004 (S.D.N.Y. Apr. 4, 2007) (Appendix 105a-122a); No. 05-Civ-5296, 2007 U.S. Dist. LEXIS 86145 (S.D.N.Y. Nov. 20, 2007) (Appendix 123a-140a).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The initial subject matter jurisdiction was based on 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331, as this matter arose under the Employee Retirement Income Security Act, a federal law.

The Second Circuit's opinion was issued on October 19, 2009. Re-hearing was sought and was denied on January 12, 2010 (Appendix 169a-170a).

CONSTITUTIONAL AND STATUTORY PROVISIONS, COURT RULES INVOLVED

ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B):

> A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph -
>
> > (i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;
> >
> > (ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;
> >
> > (iii) the fact that benefits under the plan may be payable to certain

> employees before normal retirement age shall be disregarded; and
>
> (iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

ERISA Section 204(b)(1)(C), 29 U.S.C. § 1054(b)(1)(C):

> A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan

> (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

and 26 C.F.R. § 1.411(b) - 1(a)(1):

> (a) *Accrued benefit requirements*——(1) *In general.* Under section 411(b), for plan years beginning after the applicable effective date of section 411, rules are provided for the determination of the accrued benefit to which a participant is entitled under a plan. Under a defined contribution plan, a participant's accrued benefit is the balance to the credit of the participant's account. Under a defined benefit plan, a participant's accrued benefit is his accrued benefit determined under the plan. A defined benefit plan is not a qualified plan unless the method provided by the plan for determining accrued benefits satisfies at least one of the alternative methods (described in paragraph (b) of this section) for determining accrued benefits with respect to all active participants under

the plan. A defined benefit plan may provide that accrued benefits for participants are determined under more than one plan formula. In such a case, the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative methods. A plan may satisfy different methods with respect to different classifications of employees, or separately satisfy one method with respect to the accrued benefits for each such classification, provided that such classifications are not so structured as to evade the accrued benefit requirements of section 411(b) and this section. (For example, if a plan provides that employees who commence participation at or before age 40 accrue benefits in a manner which satisfies the 133 1/3 percent method of determining accrued benefits and employees who commence participation after age 40 accrue benefits in a manner which satisfies the 3 percent method of determining accrued benefits, the plan would be so structured as to evade the requirements of section 411(b).) A defined benefit plan does not satisfy the requirements of section 411(b) and this section merely because the accrued benefit is defined as the "reserve under the plan". Special rules are provided for

the first two years of service by a participant, certain insured defined benefit plans, and certain reductions in accrued benefits due to increasing age or service. In addition, a special rule is provided with respect to accruals for service before the effective date of section 411.

(2) *Cross references*——(i) *3 percent method.* For rules relating to the 3 percent method of determining accrued benefits, see paragraph (b)(1) of this section.

(ii) *133 1/3 percent method.* For rules relating to the 133 1/3 percent method of determining accrued benefits, see paragraph (b)(2) of this section.

(iii) *Fractional method.* For rules relating to the fractional method of determining accrued benefits, see paragraph (b)(3) of this section.

(iv) *Accruals before effective date.* For rules relating to accruals for service before the effective date of section 411, see paragraph (c) of this section.

(v) *First 2 years of service.* For special rules relating to determination of accrued benefit for first 2 continuous years of service, see paragraph (d)(1) of this section.

(vi) *Certain insured plans.* For special rules relating to determination of accrued benefit under a defined benefit plan funded exclusively by insurance contracts, see paragraph (d)(2) of this section.

(vii) *Accruals decreased by increasing age or service.* For special rules relating to prohibition of decrease in accrued benefit on account of increasing age or service, see paragraph (d)(3) of this section.

(viii) *Separate accounting.* For rules relating to requirements for separate accounting, see paragraph (e) of this section.

(ix) *Year of participation.* For definition of "year of participation", see paragraph (f) of this section.

(b) *Defined benefit plans.* A defined benefit plan satisfies the requirements of section 411(b)(1) and this paragraph for a plan year to which section 411 and this section apply if it satisfies the requirements of subparagraph (1), (2), or (3) of this paragraph for such year.

(1) *3 percent method*——(i) *General rule.* A defined benefit plan satisfies the requirements of this paragraph for a plan year if, as of the close of the plan year, the accrued benefit to which each

participant is entitled, computed as if the participant separated from the service as of the close of such plan year, is not less than 3 percent of the 3 percent method benefit, multiplied by the number of years (not in excess of 33 1/3) of his participation in the plan including years after his normal retirement age. For purposes of this subparagraph, the "3 percent method benefit" is the normal retirement benefit to which the participant would be entitled if he commenced participation at the earliest possible entry age for any individual who is or could be a participant under the plan and if he served continuously until the earlier of age 65 or the normal retirement age under the plan.

STATEMENT OF THE CASE

1. In 1999, Citigroup converted its traditional, final pay pension formula into a cash balance formula effective January 1, 2000. The new formula provided for a hypothetical individual account for each participant to which Citigroup would contribute hypothetical percentages of compensation ("Benefit Credits"), and hypothetical earnings based on a variable interest rate tied to an outside index ("Interest Credits").

2. Because a cash balance plan is a defined benefit plan, *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), it must comply with at least one of the three minimum accrual rules in ERISA Sections 204(b)(1)(A), (B) or (C), 29 U.S.C. §§ 1054(A), (B), or (C), known as the 3%, the 133 1/3%, and the fractional rules. *Id.*, 229 F.3d at 158-59. Because generally cash balance plans are based on career-average compensation, cash balance plans can comply only with the 133 1/3% accrual rule. The particular rule "requires that the value of the benefit accrued in any year may not exceed the value of a benefit accrued in any previous year by more than 33%." *Esden*, 229 F.3d at 167, n. 18.

3. Although the percentage of compensation contributed by Citigroup to participants' accounts increases by more than one third based on increasing age and service, nevertheless, as in *Esden*, "the Plan may still qualify under the 133 1/3 percent test because of the value of the interest credits compounded annually through normal retirement age,"

id., a compounding that favors younger workers. Because compliance with the 133 1/3% rule depends on the interplay between Benefit Credits, which increase with age, and Interest Credits, which decrease with age, and because Interest Credits are based on a variable interest rate, compliance with the 133 1/3% rule depends on the interest rate remaining sufficiently high to offset the increase in Benefit Credits, *i.e.*, in Citigroup's Plan, no less than 4.01%.

4. In order to insure compliance with the 133 1/3% rule regardless of the amount of the variable interest rate, Citigroup could have adopted 4.01% as its minimum interest rate, as the cash balance plan did in *Esden* in order to comply with the 133 1/3% rule. *Esden*, 229 F.3d at 167, n. 18. Alternatively, Citigroup could have provided for an automatic upward adjustment of Benefit Credits when the variable interest rate became lower than 4.01%. This device was suggested recently by the IRS in Revenue Ruling 2008-7, Rev. Rul. 2008-7, 2008-1 C.B. 419. Citigroup, however, devised a third unorthodox alternative.

5. Citigroup provided that, when the Plan's rate of accrual did not meet the 133 1/3% test, participants' accounts would be made to comply with the fractional rule of accrual. Because that rule, however, is inapplicable to a career-average benefit formula, Citigroup created an alternative, final-average formula in Article 4.1(e) of the Plan ("Minimum Account"). According to this provision, if the variable interest rate dips below 4.01%, Citigroup calculates the "Minimum Account" under Article 4.1(e) and adds the difference - which it refers as a "top-up"

amount to the participants' accounts, in a purported effort to comply with ERISA's minimum accrual rules.

6. The District Court held that Citigroup misapplied the fractional rule in Article 4.1(e) when it held that only the 133 1/3 % rule could be applied to cash balance plans. The District Court ordered Citigroup to bring the Plan's benefit formula into compliance with the 133 1/3% rule. On appeal, the Petitioners and Respondents agreed that the fractional rule can be applied to cash balance plans, but differ on how it should be applied.

7. The misapplication of the fractional rule caused its employees to lose a substantial portion of their pension benefits, as it resulted in a violation of ERISA's prohibition against backloading benefits. Citigroup did so by testing compliance with the fractional rule only once, at separation from service, rather than on a year-by-year basis, as befits the letter and purpose of a rule that governs the rate of accrual. Another device used by Citigroup to backload benefits and prevent its employees from obtaining their rightful pensions was its reliance on the 133 1/3% rule in some years and on the fractional rule in others.

8. The Second Circuit Court of Appeals reversed the District Court and ruled that Citigroup's Article 4.1(e) fix to the backloading problem does not violate ERISA and that its calculation of a participant's pension upon separation from employment comports with the fractional rule. The Second Circuit held that the rate of benefit accrual during a participant's employment is unimportant as

long as proportional benefits are paid at the time of departure. 584 F.2d at 469. Petitioners appeal to this Court from that part of the Second Circuit's ruling.

9. The Court of Appeals' reversal resulted in a significant pension loss for more than one hundred thousand class members, who were former and current participants of Citigroup, Inc. This ruling decided an important question of federal law that has not been directly addressed by this Court. This Court, has, however, suggested *in dicta*, that the Second Circuit is incorrect. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512, n. 9, (1981), the Court noted that the fractional rule "is essentially a pro rata rule under which, *in any given year*, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age." (Emphasis added). The pension loss that can result from the improper application of the fractional rule in this context can affect pensioners in similar plans if left as is. Therefore, this Court must settle this important federal question.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an opportunity for the Court to address a significant question of federal law that has not been, but should be, squarely addressed by this Court. As noted earlier, and which will be explained in more detail below, the Second Circuit's opinion concerning the application of the fractional rule deprives over one hundred thousand pensioners a substantial portion of their pensions, by not applying the fractional rule in all years and by testing compliance with the fractional rule only at separation from service, rather than on a year-by-year basis. This determination can have a wide-ranging affect on participants in similar pension plans because the application of utilizing the fractional rule in this manner will deprive them of a substantial portion of their pensions if this ruling is left uncorrected.

I.

Citigroup Short-Changed Its Employees Out Of A Substantial Portion Of Their Pensions By Both Applying Different Accrual Rules In Different Years, And By Misapplying The Fractional Rule

A. The Second Circuit Incorrectly Ruled That Citigroup May Apply Different Accrual Rules for the Same Participants in Different Years

The sole basis for the Second Circuit's

contention that Citigroup may apply the 133 1/3 rule in some years and the fractional rule to the *same* participants in years when a decrease in the variable interest rate causes the Plan to violate the 133 1/3 rule is its reliance on Rev. Rul. 2008-7, 2008-1 C.B. 419. The Second Circuit does not rely on any section of ERISA, a precedent of this Court, or even an administrative regulation to deprive over 100,000 participants of the full value of their pension benefits.

The Second Circuit's reliance is misplaced for several reasons. First, the plan formula in I.R.S. Revenue Ruling 2008-7 complies with the 133 1/3% rule for all but a small sub-group of participants, namely, grandfathered participants who are age 50 to 55, a "classification" which the Ruling found not to be "so structured to evade the accrued benefit requirements..." Rev. Rul. 2008-7; 2008-7 I.R.B. 419. There are no "classifications," however, in the Citigroup Plan.

Second, if the Ruling could be read to support Citigroup's year-to-year application of different accrual methods, the Ruling would be neither "authoritative administrative materials [sic]" nor "["c]onsistent with 26 C.F.R. §1.411(b)-1(a)(1)." In fact, the Ruling would be clearly inconsistent with that Regulation, which requires that the same test must apply "with respect to all active participants under the plan." It would also be inconsistent with IRS Doc. 6390, which provides: "It is not permissible for a plan to satisfy one test in a given year and fail that test in a second year, even though it might satisfy another of the three tests in the second year." p. 8. Such inconsistency, particularly

when coupled with a complete lack of reasoning, negates any deference to Ruling 2008-07, as found by other courts. *See, e.g., Hurlic v. S. Cal. Gas Opinion Co.*, 539 F.3d 1024, 1034 (9th Cir. 2008), where the Court held that the Ruling "provided little in the way of reasoning" and was, therefore, "unpersuasive." As noted by this Court, an "unreasoned statement ... can[not] trump a formal regulation with the procedural history necessary to take on the force of law." *Cent. Laborers' Pension Fund v. Heinz*, *supra*, 541 U.S. 739, 748 (2004).[1]

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[1]IRS Document 6390, Rev. 12-98, constitutes an authoritative interpretation of the IRS' position on minimum accrual rates for defined benefit plans, and therefore is entitled to *Chevron*-style deference. The Supreme Court has limited *Chevron* deference to express Congressional delegations of interpretative authority, and to situations where legislative delegation to an agency is implicit. *See Chevron USA, Inc. v. Natural Res. Def. Council, INc.*, 467 U.S. 837, 844 (1984). An agency's reasonable, consistently held interpretation of its own regulations is entitled to deference. *INS v. National Center for Immigrants Rights*, 502 U.S. 183, 189-190 (1991). Furthermore, an agency publication that is a "fair and considered" interpretation of the law is entitled to deference, regardless of its form. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

In a similar context, the Second Circuit specifically addressed the issue of the level of deference accorded to the IRS for its authoritative position set froth in an informal notice - a publication that is akin to Doc 6390 because the Notice similarly "describes the existing regulatory scheme and explains how the IRS interprets this to apply to cash balance plans." *Esden*, *supra*, 229 F.3d at 172. The Court held that despite the "form of publication," the publication warranted full *Chevron*-style deference because the position articulated was "consistent and reasonable." *Id*, 229 F.3d at 169; *see also Long Island Care at*

Third, permitting compliance with different accrual methods in different years for the *same participants* would run counter to the purpose of permitting the application of different accrual methods to different "classifications" of employees. That purpose - as reflected in the legislative history of 26 C.F.R. §1.411(b)-1(a)(1) - was to permit "classifications" based on different negotiated contribution rates, with the benefits under each contribution rate to be tested separately. *See* Treasury Decision 7501, 1977-2 C.B. 133, T.D. 7501 (1977), which first added the provision to the Regulation, based on written and oral comments at a public hearing held on April 20, 1976.[2] The Treasury Decision(s) stated in pertinent part:

Home, Ltd. v. Coke, 551 U.S. 158 (2007) (high degree of interpretative deference due to the DOL's post-litigation Advisory Memoranda, despite the fact that the memo was issued only to DOL personnel and was created in direct response to the impending litigation); *Weil v. Ret. Plan Admin. Comm. of the Terson Co., Inc.*, 933 F.2d 106 (2d Cir. 1991) (court granted *Chevron* deference to IRS position as articulated in an *amicus* brief).

[2]26 C.F.R. §1.41 1(b)- I (a)(1), as it first appeared in the Temporary Regulations issued by the IRS in 1975, provided that a defined benefit plan "must provide only one method for the computation of accrued benefits," with no mention of employee "classifications." 40 Fed. Reg. 51, 421 (Nov. 5, 1975) ("Preamble"), and 40 Fed. Reg. 51, 429 (Section 1.411(b)-1(a)(1)), "Accrued benefit requirement"). Similarly, the Proposed Regulations, also published on November 5, 1975 for comment and subject to a public hearing, contained the same one-accrual-method requirement for all employees. 40 Fed. Reg. 51, 445("Preamble") and 40 Fed. Reg 51, 446 (1.411(b)-1(a)(1); "Accrued benefit requirement").

> A statement has also been added to the final regulations to allow plans to set up classifications and test accrued benefits with respect to such classifications separately from the accrued benefits with respect to other classifications. *It was specifically contemplated that this provision would allow different negotiated contribution rates and benefit levels*, e.g., one benefit for a 50 cent an hour contribution and another benefit for a dollar an hour contribution, with the benefits under each contribution rate to be tested separately. (Emphasis added)

Fourth, applying different accrual methods to the *same* employees in different years would evade the purposes of ERISA's minimum accrual standards, as illustrated by the example set forth in IRS Document 6390, Rev. 12-98, p. 8:

> For example, a plan that accrues a benefit rate of 1.5 percent for the first six years of participation, 2 percent for the next 6 years, 14 percent in the 13th year and 2.6 percent in later years would satisfy the 133 1/3 percent test for the first 12 years only while satisfying the fractional test in the 13th and later years but not before.

The plan in the example does not satisfy either the 133 1/3% or the fractional rule. The reason is that

the rate of accrual in the thirteenth year is more than one third greater than in any earlier year, thereby violating the 133 1/3% rule. It also violates the fractional rule, because it does not comply with it until the 13th year, when the accrued benefit catches up with the minimum benefit required by the fractional rule. If such a formula were lawful as determined by the Second Circuit, it would make a mockery of the prohibition against so structuring a benefit formula "as to evade the requirements of section 411(b) contained in 26 C.F.R. §1.411(b)-1(a)(l).

Finally, testing compliance with the fractional rule on a year-by-year basis is also required by the fact that a participant is entitled to be informed of the exact amount of his accrued benefit at least once a year. ERISA Section 105(a)(2)(A)(i), 29 U.S.C. § 1025(a)(2)(A)(i), requires the plan administrator once a year upon request of any participant to furnish in writing "on the basis of the latest available information - (I) the total benefits accrued ..." Inasmuch as an employee's request to know his accrued benefit can be made each year, the plan administrator is required to apply and comply with the fractional rule each year, not only upon separation from service.

B. The Lawful Year-By-Year Application Of The Fractional Rule Shows The Extent To Which Citigroup Short-Changed Its Employees

The purpose of Citigroup's violation of the fractional rule becomes self-evident when comparing the "top-up" amounts produced by Plaintiffs' lawful year-by-year application of the fractional rule with Citigroup's unorthodox application.

For example, in the case of a 45-year old participant with 20 years of service at separation, Citigroup's actuary calculates the "top-up" amount to be $ 8,921.00 (*i.e.*, $ 168, 730 - $ 159,809) (A-1501). In the case of 65-year old participant with 40 years of service this calculation is $0. Pursuant to Citigroup's actuary, the maximum "top-up" amount," $ 30,198, occurs at age 60 with 35 years of service.

By contrast, when applying the fractional rule on a year-by-year basis (based on the same assumptions), Petitioners' actuary found that significant additional amounts must be added to the account balances in most years (A-1707, ¶9), (A-1714, Exhibit 3). These calculations show that the "top-up" amount after 40 years of participation for an employee age 65 is $159,485, in sharp contrast to Citigroup's $0.

Those "top-up" amounts - as measured on a year-by-year basis - are even greater if the fractional rule is applied starting at ages 21 and 18, rather than only at age 25. As shown by Petitioner's actuary, utilizing the proper application of the fractional rule

starting at age 21, the "top-up" amount required to be added to the account balance by the time such a participant reaches age 65, *i.e.*, after 44 years of service, is $ 251,979 (A-1707, ¶ 10; A-1718). A similar calculation for 47 years of service starting at age 18 would yield an additional $ 345,893. (A-1707, ¶ 10; A-1716). As the District Court correctly held, Citigroup's "unlawful application of the fractional rule ... had the effect of keeping accrual rates below the minimum rate prescribed by statute." 470 F.Supp. 2d at 339.

C. The Second Circuit Incorrectly Decided That ERISA Requires a Plan to Comply with the Fractional Rule Only at Separation from Service

(1) The Language Of The Fractional Rule Requires Testing Compliance Each Year

The Second Circuit relied upon the language of the fractional rule to hold that the test be applied only at separation from service. That language in pertinent part is as follows:

> A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age ...

29 U.S.C. §1054(b)(1)(C).

The Court's sole focus was on the phase "upon his separation from service," and it used this phase to deny over 100,000 participants the full value of their pensions. In doing so, the Second Circuit overlooked the fact that it is the "plan" that must satisfy the test, and that it must satisfy it with regard to "any participant." Because participants separate from service every year, a plan cannot satisfy the fractional rule unless it satisfies it in the present and all future years. *See, e.g.*, 26 C.F.R. §1.411(b)-1(b)(3)(iii) (Example 2) (when the accrued benefit starting with the eleventh year of participation would be less than the statutory minimum, the *plan* does not comply with the rule, regardless of the fact that it complied in the first ten years).

The District Court correctly decided this issue when it relied on *Alessi v Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512, n. 9 (1981), which noted that the fractional rule "is essentially a pro rata rule under which *in any given year*, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age." (Emphasis added.) The District Court also relied on 26 C.F.R. §1.411(b)-1(b)(3), which, as summarized in IRS Document 6390, Rev. 12-98, p. 12, provides:

> The fractional rule operates to prevent back-loading and ensures a proportional rate of benefit accrual. It compares the part of the final benefit payable to a

> participant *at any time* (for example, accrued benefit) to the normal retirement benefit." (Emphasis added)

Numerous court decisions also support the year-by-year application of the fractional rule. *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F.Supp. 258, 269 (S.D.N.Y. 1997), the Court held that "[t]he Fractional Rule is satisfied if the accrued benefit as of a *given participation year* is not less than the following: Normal Retirement Benefit x Actual Years of Participation/Years of Service from Entry to Normal Retirement Age." (Emphasis added) Similarly, *Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d 977, 981 (3d Cir. 1985), held: "The plan must provide a formula under which each participant's actual accrued benefit under the plan can be determined *in each plan year*." (Emphasis added). *Hoover* relied on I.R.S. Technical Information Release 1403 (Sept. 17, 1975), which stated:

> An accrued benefit, then, represents the interest in a retirement benefit that a participant earns *each year*, and a plan must state a method or formula for determining a participant's annual accrual rate. This requirement enables a worker to mark his or her progress toward the full pension benefit due at retirement.

Hoover, 756 F2d at 981-82. (Emphasis added).

(2) The Legislative History Also Supports Testing Application Of The Fractional Rule Each Year

The fractional rule was first introduced in the Senate on April 18, 1973, as part of the Nixon administration's proposed "Individual Retirement Benefits Act of 1973," and referred to the Committee on Finance. Leg Hist, pp. 325.[3] It referred to "an employee's accrued benefit as of any applicable date ..." Leg Hist, p. 330. The administration's proposal was incorporated into S 1179, which had been introduced on March 16, 1973, and also referred to the Committee on Finance, as was S. 1631, which was introduced in the Senate on April 18, 1973 Leg Hist, p. 325.

On August 21, 1973, S.1179, as amended, was reported out of the Finance Committee under the title "Comprehensive Private Pension Security Act of 1973." Leg Hist, p. 780. Except for editorial changes, it contained the same fractional rule provision as S.1631 and, like S.1631, referred to "an employee's accrued benefit as of any applicable date." Leg Hist, p. 839-40. The Report that accompanied S.1179, referred to the fractional rule benefit as the benefit "on the date in question" and "the date when the computation is being made." Report 93-383, p. 51, August 21, 1973. Leg Hist, p. 1119.

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[3]All references to "Leg Hist" are to the "*Legislative History Of The Employee Retirement Income Security Act of 1974*," Prepared By The Subcommittee On Labor Of The Committee On Labor And Public Welfare, United States Senate, April 1976, U.S. Gov. Printing Office, Washington, 1976.

On March 4, 1974, the Senate passed H.R. 2, which contained the same fractional rule provision as S 1179 (as subsequently adopted in S. 4, Leg Hist, pp. 1292-93, and in H.R. 4200, Leg Hist, pp. 1904-05.). Because the version of H.R. 2 adopted by the House contained the 3% and the 133 1/3% rules, which had originated in the House, but not the fractional rule, which originated in the Senate, a Conference Report on H.R. 2, dated August 12, 1974, recommended adding the fractional rule to the other two. The version of the fractional rule recommended by the Conference Committee contained for the first time the "upon his separation from service" phrase adopted by Congress and relied upon by Citigroup. The Conference Committee's explanation, however, continued to refer to "the date in question" and "the date when the computation is being made." Conf Report, p. 274, Leg Hist, p. 4541. Thus, it is quite clear that the change was merely editorial, not substantive, and that a plan's compliance with the fractional rule must be tested each year, not only upon separation from service as incorrectly held by the Second Circuit.

CONCLUSION

For the reasons stated above, the writ should be granted and the case set down for argument.

Dated: April 12, 2010

Respectfully submitted,

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